Supreme Court, U.S.
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NO. 94-592

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLETA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security,

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

MOTION TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

Pursuant to Sup. Ct. R. 39, Respondent, LUELLA PENNINGTON, moves to file her Brief in Opposition to the Petition For Writ Of Certiorari filed herein. In support thereof, Pennington offers the attached affidavit evidencing her financial status and states that:

1. She represents a class of claimants who have or will apply for unemployment insurance in Illinois;

2. She is, and has been represented in this matter, by the Legal Assistance Foundation of Chicago ("LAFC"), a legal services organization. One of her attorneys, Mr. Jeffrey B. Gilbert, has been a partner with Johnson, Jones, Snelling & Gilbert since September 16, 1994, but was

employed at LAFC for fifteen years prior thereto. Since his departure from LAFC, Mr. Gilbert has remained as counsel to Ms. Pennington and the class in this case and is co-counseling with LAFC;

3. On July 7, 1985, Ms. Pennington moved to file this action in forma pauperis in the United States District Court for the Northern District of Illinois. That motion was granted on July 19, 1985.

WHEREFORE, Respondent requests that this Court permit her to proceed in forma pauperis.

Respectfully submitted,

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-vs-

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, **LUELLA PENNINGTON**, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed in this matter without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to redress; and that I desire to respond to the Petition for Certiorari filed by Lynn Q. Doherty and to otherwise defend the Court of Appeals' decision should this Court grant the Petition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appear are true.

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per annum per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

I was last employed part-time in September 1986 when I earned approximately $4.00 per hour for 20 hours per week, and I received some additional unemployment insurance benefits for a total of approximately $500.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes; describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? YES

a. If the answer is yes, state the total value of the items owned.

I have a checking account (No. 10000655084) at Merchandise National Bank in Chicago, Illinois. I receive a month Social Security check in the amount of $467. I have approximately that amount (or a little more) in the account. When a check is

deposited, ~~and~~ I spend it down through the month until the next check arrives. I also receive $ 80- in food stamps every month.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I have no dependents other than myself.

I understand that a false statement or answer to any questions in this affidavit will subject me to ~~penalties~~ for perjury.

Luella Pennington
LUELLA PENNINGTON

SUBSCRIBED AND SWORN to before me this 24 day of OCTOBER, 1994.

"OFFICIAL SEAL"
Kathleen M. Moore
Notary Public, State of Illinois
My Commission Expires 12/16/97

Kathleen M. Moore
NOTARY PUBLIC

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____

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Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

I. THE NATURE OF THE ACTION

Respondent, Luella Pennington, and the members of the class she represents, are claimants for unemployment insurance ("UI") benefits under the Illinois Unemployment Insurance Act ("IUIA").[1] 820 ILCS 405/100 et seq. They brought this case against Petitioner, the Director of the Illinois Department of Employment Security ("Director" of "IDES"), to challenge the statutory definition of "base period" found at section 237 ("section 237") of the IUIA. 820 ILCS 405/237. The base period is the time period within which claimants must have earned sufficient wages to qualify for UI benefits. The claimants argue that the definition of "base period" in section 237 delays payment of UI benefits in violation of 42 U.S.C. § 503(a)(1), which requires that a state's unemployment insurance law provide for "methods of administration ... reasonably calculated to insure full payment of unemployment compensation when due" (the "when due" clause), and the Secretary of Labor's regulations implementing the "when due" clause. 20 C.F.R. pt. 640.

A panel of the Court of Appeals for the Seventh Circuit held, unanimously, that section 237 defined a "method of administrative" that was subject to the when due clause. Appendix ("App") 1-24.[2] It then remanded the case to the district court for a

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[1] Because this case involves numerous acronyms, a glossary is included at the end of this brief.

[2] In addition to the Appendix, which is bound with the Petition For Writ of Certiorari and which we cite as "App.", we cite to: the Petition itself ("Pet."); Respondent's Appendix ("Resp. App.") which is attached to this brief; and portions of the record transmitted to the Court of Appeals, including the trial transcript ("Tr.") and plaintiffs' trial exhibits ("P. Ex.").

factual determination as to whether that administrative method complied with the "when due" clause and the implementing regulations. Id. at 23-4. The Director filed a petition for rehearing and suggestion for rehearing en banc in the court of appeals, but "no judge in active service ... requested a vote thereon, and all judges on the original panel ... voted to deny the petition." Id. at 26. Accordingly, the Director's rehearing petition was denied. Id. at 25-6.

The panel also denied the Director's motion to stay the mandate pending her filing of a petition for writ of certiorari in this Court. Resp. App. 1-3. In its ruling on that motion, the panel observed, among other things, that the Director did not enjoy a probability of success on the merits of her petition for a writ of certiorari, and that, in any event, she might ultimately prevail in the litigation on remand. Id. at 2-3. Accordingly, the appellate court's mandate issued, and the case is proceeding apace in the district court.

II. STATEMENT OF FACTS

Throughout her petition, the Director ignores the most important facts, virtually all of which are ones to which she stipulated. We present these facts here, citing to the Stipulations of Fact in Section III of the Amended Final Pretrial Order, which are found in the Appendix at 66-84.[3] E.g., "Stip. ¶ A.1, App. 66-7."

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[3] The citations to Illinois statutes in the Stipulation are to the old "Illinois Revised Statutes" ("Ill. Rev. Stat.") which have been replaced by a new codification, "Illinois Consolidated Statutes" ("ILCS").

A. The Operation Of Section 237 Under The IUIA

In Illinois, an eligible claimant can draw regular UI benefits during a "benefit year," which is the one-year period beginning with the Sunday of the week in which she first files a "valid claim" for benefits. 820 ILCS 405/242; Stip. ¶ A.3, App. 67-8. To file a valid claim, however, a claimant must have earned sufficient wages during a year period called the "base period."[4] Id. at 242 and 500.E.; see Stip. ¶ A.1, App. 66-7.

The claimants do not challenge either the amount of earnings required to qualify for benefits under the IUIA or section 237's dictate that a claimant must have earned that amount during a one year period. Rather, the claimants challenge section 237's definition of that one year period as necessarily including only "the first four of the last five completed calendar quarters immediately preceding the benefit year" (the "section 237 base period"). Id. at 237; see Stip. ¶ A.4, App. 68. By that definition, section 237 skips both the calendar quarter in which the claimant files his claim (the "filing quarter"), because that is not a "completed" quarter, and the preceding calendar

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[4] To be eligible for benefits, a claimant must have earned at least $1600 during the whole base period and at least $440 outside the calendar quarter in which he earned the most wages. 820 ILCS 405/500.E; see Stip. ¶ A.1, App. 66-7. We call this the "earnings requirement."

Whether a claimant has sufficient wages in his base period is resolved by a "finding" issued pursuant to Section 701 of the IUIA. Id. at 701; see Stip. ¶ A.2, App. 67. If a claimant is monetarily eligible, he is said to have filed a "valid claim." Id. at 242 and 500.E; see Stip. at ¶ A.2, App. 67.

That a claimant has filed a valid claim does not necessarily mean that he will receive benefits, however, because he can be disqualified based on a non-monetary "determination" issued pursuant to section 702 of the IUIA. Id. at 702; see Stip. at ¶ A.2 n. 4, App. 67. Examples of non-monetary disqualifications are those that disqualify claimants who were "discharged for misconduct connected with work" or "voluntarily leaving work without good cause attributable to the employ[er]." See id. at 601 and 602.

quarter (the "lag quarter"), because that is the fifth of the five completed calendar quarters prior to the benefit year. See Stip. ¶ A.5, App. 68; Tr. 16-19. Consequently, when IDES determines whether a claimant has sufficient "qualifying wages," section 237 dictates that it disregard any wages earned by the claimant in both the filing and the lag quarters.[5] Id.

Examples illustrate the operation of section 237:

If claimant Smith applied for benefits in the first quarter of 1994, her base period would be the fourth quarter of 1992 and the first three quarters of 1993. If she earned $1160 in one of those base period quarters, $400 in another, and $20 in each of the other two, she would have earned just enough qualifying wages to be eligible for benefits. See Stip. ¶ A.1. n. 3, App. 67; Tr. 23-4; and 820 ILCS 405/500.E (providing that, to be eligible for benefits, a claimant must have earned at least $1600 during the whole base period and at least $440 outside the calendar quarter in which she earned the most wages).

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[5] As used herein:

(a) "qualifying wages" are the wages that a UI claimant earned during the Section 237 base period that can, therefore, be used to establish eligibility when the claimant first applies for benefits.

(b) "disregarded wages" are the wages that a UI claimant earned in either his lag or filing quarter that cannot be used to establish eligibility when a claimant first applies for benefits.

(c) "lag quarter eligible claimants" are the class members who need only their lag quarter wages to become eligible.

(d) "filing quarter eligible claimants" are the class members who need both their lag and filing quarter wages to become eligible.

Consider, in contrast, claimant Jones who, we may assume, also applied for benefits in the first quarter of 1994 and whose base period would therefore be the same as that of claimant Jones (the fourth quarter of 1992 and the first three quarters of 1993). Assume also that claimant Jones earned $1500 in the second base period quarter (January 1 through March 31, 1993), $400 in the third quarter (April 1 through June 30, 1993), and $20 in the fourth quarter (July 1 through September 30, 1993), but none in the first base period quarter (October 1 through December 31, 1992). Assume, too, that Jones earned $20 in the fifth completed quarter prior to filing (October 1 through December 31, 1993). Since the fifth completed quarter prior to filing is the lag quarter, the $20 Jones earned in that quarter is disregarded because section 237 dictates that lag quarter wages are not counted in determining eligibility. Jones is, therefore, ineligible based on her first quarter 1994 claim because, though she earned more than $1600 in her section 237 base period, she did not earn more than $440 outside the calendar quarter in which her wages were highest. See Stip. ¶ A.5 n. 5, App. 68.

In sum, because of section 237, unless a claimant has sufficient qualifying wages in the first four of the last five completed calendar quarters, he is ineligible for benefits when he first becomes unemployed, even if he would have sufficient qualifying wages if his earnings in the lag and/or filing quarter were counted toward eligibility. Id. at ¶ 6, App. 68. Thus, to use our example, Claimant Smith is eligible when she first becomes unemployed, but claimant Jones is not, even if though Jones earned wages in

her lag quarter that, if counted, would constitute enough to qualify her for benefits. Id. ¶ 5, App. 68.

But if a claimant like Jones simply waits until her most recent wages fall into the first four of the last five calendar quarters as defined by a later dated claim, she becomes eligible for benefits. Id. ¶¶ 7-8, App. 68-9. Claimant Jones, for example, will become eligible for benefits if she waits until the second quarter of 1994 to file a claim, because a claim filed during that quarter will permit the wages she earned during the fourth quarter of 1993 to be counted in her base period. Id.

The Director wrongly asserts that the class consists of "claimants who are monetarily ineligible for benefits." Pet. at 5. She can make that assertion only by ignoring two of her own stipulations. First, the class definition itself confirms that class members are claimants who were denied benefits "solely because part or all of their wages, otherwise sufficient to satisfy Section 500(E) of the Act, were disregarded by operation of section 237 of the Act." Stip. at ¶ B.3.a; App. 71-2 (emphasis added). Second, the Director has stipulated that wages that are initially disregarded, because they fall in a claimant's lag and/or filing quarters, become qualifying wages by the passage of enough time so that they fall within the section 237 base period defined by the date of her second claim. Id. at ¶¶ A.7 and 8, App. 68-9. Thus, the Director has admitted that, although class members are treated as ineligible when they first apply for benefits, they become eligible by doing nothing more than waiting until sufficient time has passed to file a second claim.

Accordingly, the class does not consist of "claimants who are monetarily ineligible for benefits." Pet. at 5. It just consists of those who cannot establish their eligibility until they wait for their lag or filing quarter wages to fall within the base period defined by section 237.[6]

B. The Reason Section 237 Delays Payment Of Benefits: Wage Record, Wage Request, And Movable Base Period Systems

Just as the Director ignores the fact that section 237 delays adjudication of eligibility, she ignores the reason why section 237 does so. Each state uses one of three systems for compiling wage data. See Stip. ¶¶ C.1-6, App. 72-3. The most common system, and the one used in Illinois, is the wage record system. Id. at ¶ C.2, App. 73; Tr. 23. Many states once used a wage request system, see id. at ¶ C.4, but, to our knowledge, only New York and New Hampshire still do so. Recently, some wage record states have begun to use "movable" base periods. Id. at ¶ C.6, App. 74; P. Ex. 2.

Under a wage record system, employers that are covered by the state's unemployment insurance statute report gross wages of all their employees to the state unemployment security agency ("SESA") on a quarterly basis. Id. at ¶ C.2, App. 73; Tr. 12, 16. In contrast, under a wage request system, the SESA does not request wage information of a claimant's employer until the claimant applies for benefits, when her wages are required to adjudicate her claim. Id. at ¶ C.4., App. 73; Tr. 11-16.

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[6] Lag quarter eligible claimants must wait from when they apply in their filing quarters until the beginning of the next calendar quarter. Tr. 70. Filing quarter eligible claimants must wait from when they apply in the filing quarter through the whole of the next full calendar quarter until the beginning of the subsequent quarter to file a valid claim. Tr. 70-71.

A wage record system is characterized by the existence of a gap - which is commonly called the "lag" period - between the end of a claimant's base period and the beginning of that claimant's benefit year. Id. at ¶ C.3, App. 73; Tr. 15-20. The Director has admitted that, in wage record states, "[t]his gap is necessary because time is required for employers to report wages to the SESA and for the SESA to make that information available in the local UI offices where claims are first taken and adjudicated." Id. She has also admitted that, in contrast, SESAs in wage request states can request the most recent wage information for each claimant. Id. at ¶ C.5, App. 73-4; Tr. 15-16. Accordingly, in a wage request state, there is no need for a gap (or at least not a long one) between the end of the claimant's base period and the beginning of his benefit year. Id.; Tr. 13-20.

A so-called "movable base period" system retains certain advantages of a wage record system while minimizing the delay that is experienced, because of the lag period, by those claimants who need their lag and/or filing quarter wages to qualify for benefits. See Stip. ¶ C. 6., App. 74; Tr. 27. Under a movable base period system, the state uses a section 237 base period, except that, when an applicant has insufficient qualifying wages in that base period, the SESA promptly redetermines the claim based on the wages earned in the four completed calendar quarters prior to the claim.[7] Id.;

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[7] A chart of the base periods used by states as of the trial is Plaintiff's Exhibit ("P. Ex.") 2. Since that chart was developed, however, Maine, Massachusetts, Michigan and Rhode Island have adopted "movable" base periods. See Me. Rev. Stat. Ann. tit. 26, § 1043.3 (1992); Mass. Ann. Laws ch. 151A, § 1(a), as amended by ch. 26, § 6 of the Acts and Resolves of 1992; Mich. Comp. Laws § 421.45, as amended by 1994 Mich. Pub. Act. 162; R.I. Gen. Laws § 28-42-3(10).

see e.g., Ohio Rev. Code Ann. § 4141.01(Q); Tr. 25-27. Vermont also moves the base period to include filing quarter wages earned prior to the claim. 21 V.S.A. § 1301(17).

C. Luella Pennington's And The Class Members' Stories

Luella Pennington applied for UI on June 7, 1984 (the second quarter of 1984), and thereby created a base period of January 1, 1983 to December 31, 1983. Stip., ¶ B.2; App. 70-1. Pursuant to section 237, the first and second calendar quarters in 1984 were not in her base period, because those were her lag quarter and filing quarter, respectively. Id. at ¶ B.2.b.-d; App. 70-71. Looking only to the wages Pennington had earned in calendar year 1983, the section 237 base period defined by her June claim, Pennington was ineligible for benefits. Id. at ¶ 2.c., App 71. Accordingly, IDES denied her benefits based on that claim. Id.; P. Ex. 3.

Pennington remained unemployed, however, and filed a second claim for benefits on or about October 5, 1984. Id. at ¶ 2.e., App. 71. The section 237 base period determined by reference to that October claim included the period from January 1 through June 30, 1984. Id. at ¶ 2.f.; App. 71. That is, by the passage of time, the quarters that had been Pennington's filing and lag quarters when she filed in June, became base period quarters when she filed in October and, consequently, the wages that IDES disregarded for purposes of her June claim became qualifying wages for purposes of her October claim. Id. at ¶ 2.g., App. 71. She thus became entitled to receive benefits. Id.; see Pet. at 5 (although "Pennington was denied ... UI benefits upon filing her June 1984 claim because she had earned no wages during her base period[,] ... [i]n October 1984, she [became] ... monetarily eligible for UI benefits based

on her earnings in the first and second quarters of 1984 (App. 71), and she did receive benefits for the benefit year beginning October 1984 after filing a valid second claim").

To receive UI benefits, however, Pennington had to wait from June 7 to October 5, 1984, whereas, if IDES had used Pennington's lag quarter wages to determine eligibility, she would only have had to wait from June 7 until Monday, July 2, 1984 to file a valid claim. Stip. at ¶ B.2, App. 70-71; Tr. 70-71. Moreover, the Director has stipulated that "[b]y definition, section 237 delays the date on which each class member can file a valid claim in a manner similar to the delay experienced by Pennington as a result of section 237." Stip. ¶ B.3.b; App. 72.

III. THE "WHEN DUE" CLAUSE

The when due clause "require[s] that a State [unemployment insurance] law include provision for such methods of administration as will reasonabl[y] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). That regulatory standard was derived from California Department of Human Resources Development v. Java, 402 U.S. 121 (1971), a case in which this Court considered the legality of a provision that suspended payment of benefits to claimants during the pendency of any appeal by their former employers. Id. at 122. In a unanimous opinion, the Court held that the provision violated the "when due" clause because "'when due' was intended to mean at the earliest stage of unemployment that payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." Id. at 131.

Thus, Java struck down a provision that delayed payment of benefits after an initial administrative decision that the benefits were due. But the when due clause requires not only prompt payment of benefits, but also prompt adjudication of claims. This Court made that clear in another unanimous opinion, Fusari v. Steinberg, 419 U.S. 379 (1975), when it expressly rejected any reading of the "when due" clause under which "benefits are not 'due' ... until administratively deemed payable." Id. at 388 n. 15. The Court reasoned that "such a definition of the 'when due' requirement of federal law would leave little vitality to Java and would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits." Id.

The Secretary of Labor also interprets the "when due" clause to require not only "such methods of administration as will reasonabl[y] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible," 20 C.F.R. § 640.3(a), but also to confirm that, "implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility." Id. at § 640.1(a)(2).

IV. THE COURSE AND DISPOSITION OF THE PROCEEDINGS IN THE DISTRICT COURT AND IN THE COURT OF APPEALS

Because the "when due" clause governs only the "methods of administration" of the states' unemployment insurance programs, 42 U.S.C. § 503(a)(1), "applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law." 20 C.F.R. § 640.1(a)(2). Accordingly, a state does not violate the "when due" clause by delaying payment of benefits to enforce provisions

that govern eligibility. See, Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 482-87 (1977) (provision denying benefits to claimants who were unemployed "due to a labor dispute" did not violate the "when due" clause).

Before the trial in this case, the district court held - three times - that section 237 was a "method of administration" subject to review for compliance with the when due clause. App. 43-7, 53-4, 60-3. After the case was tried, however, the district judge reversed his three earlier rulings and held that "the definition of 'base period' in section 237 of the [IUIA] is a valid eligibility requirement and does not violate [the 'when due' clause]." App. 28, 42.

Eligibility criteria are rules that "define the class of persons eligible for benefits." Ohio Bureau of Employment Services, 431 U.S. at 486-87. Therefore, in the court of appeals, the Director argued "that section 237 functions as a measurement of each claimant's attachment to the work force ... [and] that this function demonstrates that section 237 is as much an eligibility provision that defines the class of claimants as any of the state's monetary provisions, such as section 500E's qualifying wages requirement." App. at 21. She also argued that section 237 is an eligibility criterion because it "defines what earnings are considered in determining whether benefits are due." Appellee's Brief in the Seventh Circuit at 31 (emphasis added).

The court of appeals reversed the district court's holding that section 237 defines an eligibility requirement. In rejecting the Director's argument that "section 237 functions as a measurement of each claimant's attachment to the work force," the court observed that the Director "has conceded in more than one place that the gap created

by section 237's base period, in which a claimant's lag quarter wages are not reported, 'is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated.'" App. 21 (citing Stip. ¶ C.3, App. 73) (other citation omitted).[8] The court of appeals concluded from that stipulation that "section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system." Id.

In rejecting the Director's argument that section 237 is an eligibility criterion because it "defines what earnings are considered in determining whether benefits are due," the appellate court observed that, while section 237 instructs IDES to disregard wages when they fall in the lag or filing quarter, it will later count those same wages toward a class member's eligibility if he files a second claim in a later quarter. App. 18; see Stip. ¶¶ A.5-8, App. 68-9; see also pp. 6-7 supra (explaining this point). Accordingly, section 237 does not determine whether IDES counts lag and filing quarter wages in determining whether benefits are due; it just determines when IDES will count those wages and, thus, when benefits become due. See App. 18-19.

Having "reverse[d] the decision of the district court that section 237 is an eligibility provision as a matter of law," App. 24, the panel remanded the case to the district court for "factual findings and a determination of the issue of section 237's compliance with the 'when due' clause and corresponding regulations." Id. at 23-24.

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[8] The Director tries to escape the implications of this admission by arguing that it was merely an "argument" that she "advanced only in the alternative, assuming for the sake of argument that the base period was not an eligibility requirement." Pet. at 9, n. 3. But the admission was not made merely in the Director's argument; it is contained in the Stipulations of Fact and confirmed by uncontroverted testimony. See Tr. 13-20.

The court of appeals then denied the Director's rehearing petition, see id. at 25-6, and her motion for a stay pending this Court's decision on her petition for writ of certiorari. See Resp. App. 1-3. On September 28, 1994, the Director filed her petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THIS CASE INVOLVES NONE OF THE "SPECIAL AND IMPORTANT REASONS" FOR GRANTING WRITS OF CERTIORARI

S. Ct. Rule 10 identifies "special and important reasons" that, while "neither controlling nor fully measuring the Court's discretion," are the most persuasive bases for this Court's exercise of its authority to review federal appellate decisions on petitions for certiorari. Rule 10 sets forth three such particular reasons, and one more general, "catch-all" reason. The three more particular reasons are when a federal court of appeals: (1) "has rendered a decision in conflict with the decision of another United States court of appeals on the same matter or has decided a federal question in a way in conflict with a state court of last resort"; or (2) "has decided a federal question in a way that conflicts with applicable decisions of this Court"; or (3) "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Id. at subsections (a) and (c).

The Director does not suggest that any such reasons support her petition. Indeed, she concedes that there is no conflict between the Seventh Circuit's decision below and a decision of any other federal court of appeals or any state court of last

resort. Pet. at 7 (characterizing this as "a case of nationwide first impression"). And not only is the court of appeals' decision not in conflict with any applicable Supreme Court precedent, but the court of appeals understood its ruling to follow from two unanimous Supreme Court cases: California Department of Human Resources Development v. Java, 402 U.S. 121 (1971) and Fusari v. Steinberg, 419 U.S. 379 (1975). See App. at 19-21. Moreover, the Director suggests no irregularity in the procedures below at all, let alone any that would require an exercise of this Court's supervisory authority.

The only reason identified in Rule 10 that the Director even arguably urges as a basis for this Court to hear this case is that "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." Rule 10(c). Actually, the Director does not expressly invoke even that reason as a basis for her petition, but since she asserts that "the decision below addressed a question of exceptional importance," Pet. at 7, and since no other reason is even conceivably applicable, that must be the Rule 10 ground on which she relies.

"[E]xcept in extraordinary cases, [however,] the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). Thus, that the Director seeks review of a judgment that is not final may "of itself alone" be a "sufficient ground for denial of ... [her] application." Id.; see Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] is not ripe for review by this Court"). Therefore, the Director must overcome a heavy burden to

establish that this case presents "an important question of federal law which ... should be settled by this Court." S. Ct. Rule 10(a). See also, Rudolph v. United States, 370 U.S. 269, 270 (1962) (dismissing writ of certiorari as improvidently granted where review of issue presented "would be of no importance save to the litigants themselves").

To meet that burden, the Director argues: (1) that the panel decision "will cause nationwide disruption in the various states' unemployment compensation systems," Pet. at 9 (quoting the Brief [in the court of appeals] for the United States of America as Amicus Curie at 19-20); and (2) that its decision is "wrong." Id. at 7 ("the decision below ... [is] beyond precedent and contrary to the federal administrative interpretation ... [and it] extended the scope of the federal mandate of prompt administration of state unemployment insurance laws to Illinois' base period requirement, which measures monetary eligibility for benefits"). Both of those arguments, however, are wholly without merit.

A. The Court Of Appeals' Decision Will Not Disrupt The Unemployment Insurance System

The Director asserts that the court of appeals' decision will disrupt the nation's unemployment insurance system because 45 states use a base period definition like

Illinois."[9] But the court of appeals' decision may not affect, much less disrupt, even Illinois' unemployment insurance program, because the panel remanded the case to the district court to determine, as a matter of fact, "whether ... [section 237] is compatible with the 'when due' clause." App. 23. Accordingly, the court of appeals' decision, by itself, dictates no modification to Illinois' base period provision, let alone that of any other state.

The Director argues however that, even if the claimants are not ultimately successful in convincing the lower federal courts that section 237 is unlawful, that result "would leave ... [Illinois] - and other similarly situated States - with the continuing need to litigate and justify base period methodology any time that a creative plaintiff advances an alternative that the courts had not already considered." Pet. at 9. To our knowledge, however, this is the only pending case in the country raising the issue as to

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[9] Actually the Director tries to inflate that number by her assertion that "forty-seven other states ... use a base period similar to the one challenged here." Pet. at 7-8 (quoting Amicus Br. at 18). Deep within the footnote in which she cites the 47 statutes, however, the Director notes that seven of those are states that now "use[] the type of movable base period advocated by the plaintiff class as an alternative [to Illinois']." Id. n. 2. Thus IDES includes among the statutes that are "similar to" the one we challenge, seven that are "the type advocated by [us]."

So far as we know, the actual breakdown is as follows: two states, New York and New Hampshire, still use a wage request system in which no lag period is necessary; seven states, Maine, Massachusetts, Michigan, Ohio, Rhode Island, Vermont and Washington, use wage record systems, but they employ movable base periods that minimize the delay in payment of benefits that is caused by the lag period that otherwise characterizes such a system; and the other 44 (including Illinois) use wage record systems with lag periods like the one created by section 237. See Pet. at 8 n. 2. There are 53 total "states" because the District of Columbia, Puerto Rico and the Virgin Islands are counted as states. See Unemp. Ins. Rptr. (CCH), ¶¶ 3000-3062 (All-State Charts) (1994).

which the Director seeks [illegible][10] And it is hard to imagine that other plaintiffs will jump at the chance to [illegible]gate this issue if the Director wins on remand.

Moreover, the panel's ruling does not encourage litigation "any time that a creative plaintiff advances an alternative that the courts had not already considered." Pet. at 9. As the court of appeals noted, the claimants amended their original complaint, in which they had "alleged that it was administratively feasible ... for IDES to include as the four-quarter base period both the lag quarter and, if necessary, the filing quarter ... [to] allege[] only that it would be administratively feasible for IDES to consider the lag quarter in calculating a claimant's qualifying wages." App. 5-6 (interior quotations and citation omitted). We did so after our expert witness, Peter Kauffman, had studied IDES's system and concluded that it would not be administratively feasible for IDES to include filing quarter wages in determining a claimant's eligibility. [11]

Furthermore, Kauffman testified that there were three alternative methods by which IDES could move the base period to capture lag quarter wages when necessary to determine a claimant's eligibility, and that Alternatives II and III are "administratively feasible" in the sense that, if there was no cheaper alternative, the costs of those systems would be worth the benefits they would generate to the claimants. Tr. 78-79; 88-89; 700-701. But, as the court of appeals expressly noted, Kauffman testified that

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[10] One other case, Duncan v. Washington, C86-227 (D.C. Wash.) was filed to contest the system that was once used in the State of Washington. But that case was dismissed after Washington adopted a movable base period system. See Wash. Rev. Code § 50.04.020 (1991).

[11] Of course, use of lag quarter wages would help filing quarter eligible claimants since it would allow them to file valid claims three months sooner than under the current system. See e.g., pp. 9-10 supra describing Ms. Pennington's facts.

"the marginal expense of ... [Alternatives II and III], in comparison with Alternative I, exceeded their marginal benefits." App. 8, n. 3. Thus, as accurately described by the court of appeals, the claimants' evidence supports a narrowly based challenge to the section 237 base period, not a challenge based on any "conceivable" alternative base period.

While the possibility that there will be any other litigation respecting the legality of section 237 base periods is uncertain, the prospect that there might be such litigation offers a reason not to grant the writ in this case. This is so because, if, on the one hand, another federal appellate court disagrees with the panel decision below, it will create the type of decisional conflict that would crystallize review of the later appellate decision. See Rule 10(a); see also, McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied when issue requires "further study" in lower courts "before it is addressed by this Court"). If, on the other hand, other appellate courts addressing the issue here agree with the panel decision, that will confirm that the panel below was correct and thus, strongly suggest that this Court need not allocate its resources to the resolution of the question the Director presents.

Even if the panel decision below were to give rise to many other cases as the Director predicts, her contention that such cases "will cause nationwide disruption in the various states' unemployment compensation systems," Pet. at 9, does not follow. After all, the provision that this Court struck down in Java was used in 48 states. See Appendix to Appellants' Brief in Java, No. 507 (U.S. Sup. Ct. 1970) at 69-70. Yet the

Director offers no evidence that Java disrupted the nation's unemployment insurance programs at all.

The contention that court orders requiring some states to modify their base periods will cause "nationwide disruption" of the unemployment insurance system is unwarranted in two respects. First, it wrongly impugns the ability of SESAs to modify the administration of their programs to conform to the requirements of the "when due" clause. Second, it wrongly suggests that federal district judges will be faithless to their obligation to "minimize [the] abrasive potential" of prospective remedies. Jenkins v. Bowling, 691 F.2d 1225, 1234 (7th Cir. 1982); see also, Paschal v. Jackson, 936 F.2d 940 (7th Cir. 1991) (Eleventh Amendment to United States Constitution forbids payment of retroactive benefits to unemployment compensation wrongly denied such benefits), cert. denied 112 S. Ct. 992 (1992); Esparza v. Valdez, 862 F.2d 788, 794 (10th Cir. 1988) (same), cert. denied, 492 U.S. 905 (1989).

B. The Court Of Appeals' Decision Was Correct

The heart of the petition is the Director's argument that the court of appeals was wrong in concluding that section 237 is an administrative method subject to review for compliance with the "when due" clause rather than an eligibility provision which is not subject to that review. Pet. at 10-15. That is a precarious basis on which to ground a petition for certiorari, however, for the correctness or error of a decision below is not determinative of this Court's discretion to exercise its certiorari jurisdiction. Accordingly, this Court has been reluctant to grant certiorari solely to review a decision that appears to be erroneous. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974); see

generally, Stern, Gressman, Shapiro, Geller, Supreme Court Practice (7th ed. 1993) at § 4.17.

In any event, the court of appeals decision is clearly correct: the lag period that section 237 creates is an administrative method, not an eligibility criterion:

1. As we have explained, to press her contrary argument in the court of appeals, the Director characterized section 237 as a provision that "defines what earnings are considered in determining whether benefits are due." Appellees Br. at 31 (emphasis supplied). The court of appeals, however, properly recognized that section 237 does not determine whether IDES counts lag and filing quarter wages in determining whether benefits are due; rather it determines when IDES will count those wages and, thus, when benefits become due. App. at 18-22; see pp. 12-13 supra.

In her petition, the Director makes the same argument, but recasts it slightly. First she notes that both that the earnings requirement and the requirement that these earnings fall within a one-year period prior to the date of application are legitimate eligibility criteria that Illinois may enact and modify without concern that its choice might offend the "when due" clause. Pet. at 10.[12] She then assumes that the "base period" definition in section 237 is nothing more than the one-year period within which claimants must earn at least the minimum earnings, and she therefore characterizes the base period as a "component" of the earnings requirement. Id. Based on that assumption, she argues that "[i]f an earnings requirement is not objectionable as an

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[12] Indeed, as the Director notes, those provisions of the IUIA are not in dispute. Id ("neither the plaintiff class nor the Seventh Circuit disputed that Illinois' requirement of certain earnings during some stated time frame is a legitimate measure of eligibility for UI coverage").

eligibility criterion, the specific components of that criterion should be recognized as substantive eligibility requirements, rather than methods of administration." Id.

But the very fact that we challenge neither the earnings requirement nor the one-year time period, along with the fact that we do challenge some aspect of section 237, confirms that the base period definition in section 237 is not merely a one-year period during which a claimant's earnings must fall. Rather, the other aspect of section 237, and the one that we do challenge, is the unnecessarily long lag period between the date on which a claimant's base period ends and the date on which he or she files a claim.

Moreover, the lag period is not a component part of the earnings requirement. That is certain because other states, which necessarily must have some earnings requirement confined within some time frame, use a wage request system or a movable base period to eliminate the lag period (or to minimize the delay in paying benefits that it otherwise causes). Thus, Illinois' choice to have a relatively long lag period is wholly independent of its choices as to how much earnings a claimant must have to qualify for benefits or the length of time during which those wages must have been earned.

While the lag period is not a component part of the earnings requirement, it surely is a component part of a non-movable wage record system. Indeed, the Director herself has repeatedly admitted that the "gap between the end of a claimant's base period ... and the beginning of that claimant's benefit year ... is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims

are first taken and adjudicated." Stip. ¶ C.3, App. 73; see also, Appellee's Br. at 42 ("Section 237's base period facilitates the State's utilization of wage recording"). And, as the court of appeals concluded, those admissions confirm that "section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system. In a world of high-speed information exchange, the lag quarter would not exist; yet an eligibility requirement like the 'voluntary leaving' provision [which disqualifies claimants who voluntarily leave work without good cause attributable to the employer] would. " App. at 21 (citation omitted).

2. The Director strains to avoid the implication of her admission that the lag period is an administrative method designed to permit administration of a wage record system. She does so by arguing that, since eligibility criteria "define the class of persons eligible for benefits," Hodory, 431 U.S. at 486-87, "wage requirements during a base period serve to guarantee a worker's recent attachment to the labor market ... [and that i]n establishing a threshold earnings qualification, Illinois intended to exclude from eligibility those claimants who generally have the most tenuous attachment to the workforce." Pet. at 14. That is surely so, but while that statement explains why states have earnings requirements, it tells us nothing about why states like Illinois have relatively long lag periods. Indeed, as the Director has admitted, a lag period does not "exclude ... claimants ... from eligibility" or otherwise "define the class of persons eligible for benefits." Hodory, 431 U.S. at 486-87. It just delays the time at which the state will consider the wages a claimant most recently earned in determining his or her eligibility. Stip. at ¶¶ A.7 and 8, App. 68-9.

Furthermore, the Director's argument implicitly concedes that "eligibility criteria measure a claimant's 'continued and current attachment to the labor force.'" App. at 18 (quoting Fleiszig v. Board of Review, 412 Ill. 49, 104 N.E.2d 818, 821 (1952)); see Appellee's Br. at 30, 32. But the lag period "causes class members with relatively strong attachment to the work force to wait until that attachment has weakened before they can receive benefits, and causes some to receive no benefits at all (e.g., claimants who find employment before the delay created by the lag quarter is over)." App. 18-19. Accordingly, as early as 1962, the Secretary of Labor advised states that "[s]ince unemployment insurance is designed to compensate wage loss, benefits should be based upon comparatively recent wages -- i.e., the lag between the base period and benefit year should be as short as possible." Unemployment Insurance Legislative Policy: Recommendations for State Legislation, 1962, court of appeals' Appendix item VIII at 97.[13]

Indeed, the Director herself argues that the base period is an eligibility requirement because it "defines a worker's recent employment history." Pet. at 14 (emphasis supplied). If that is so, however, Illinois' use of a base period that creates a relatively long lag period between the employment history and the date of application, instead of using a claimant's most recent employment history, is entirely anomalous. A stipulated fact resolves that anomaly by confirming that the lag period has nothing to do

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[13] The Director has abandoned the argument that the Secretary's interpretation confirms that the base period definition in section 237 is an eligibility criterion, except to characterize the court of appeals' decision as "contrary to the federal administrative interpretation." Pet. at 7. But that glancing and unsupported attack is woefully inadequate given the court of appeals' thorough consideration and rejection of the "deference" argument. App. 12-16.

with measuring a claimant's employment history, but that, instead, it "is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." Stip. ¶ C.3, App. 73. And since that is so, "section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system." App. 21.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 16, 1994.

Before

Hon. KENNETH F. RIPPLE, Circuit Judge

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiff-Appellant,

No. 92-3725 v.

LOLETA DIDRICKSON*, Director of the Illinois Department of Employment Security

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85 C 6327
Paul E. Plunkett, Judge.

ORDER

This case is before the court on the motion of the appellee to stay the issuance of this court's mandate while the appellee seeks review of the judgment of this court by a petition for a writ of certiorari in the Supreme Court of the United States. By opinion dated April 11, 1994, this court reversed the judgment of the district court and held that section 237 of the Illinois

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* During the pendency of this case, Loleta Didrickson succeeded Sally Ward as Directors of the Illinois Department of Employment Security. Director Didrickson has been substituted for her predecessor pursuant to Federal Rule of Appellate Procedure 43(c)(1).

Unemployment Insurance Act (the "IUIA"), 820 ILCS 405/237, is an administrative method subject to the "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1), and its corresponding regulations. We therefore did not accept the appellee's characterization of the provision as an eligibility provision beyond the reach of the "when due" clause. We remanded the case to the district court for further proceedings to determine whether section 237 complies with the "when due" clause and the corresponding regulations. A subsequent petition for rehearing was denied and no member of the court requested a vote on the appellee's suggestion for rehearing en banc.

The standards governing a motion for stay of mandate are set forth in detail in United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers). Familiarity with that opinion is presumed and the discussion of the applicable standards will not be repeated here. In this case, an assessment of the probability of success in further review must rest on the plenary discussion of the submissions of the parties in the unanimous opinion of the panel. It is also worthy of note that the panel has already reexamined its analysis in its consideration of the petition for rehearing and declined to alter its judgment. Moreover, the other members of the court were invited by the appellee to ask for rehearing en banc and no member of the court asked for a vote on that suggestion. Finally, no showing of irreparable harm has been made by the appellee. The judgment of this court contemplates further

proceedings in the district court. In those proceedings, the district court may determine that section 237 complies with the "when due" clause.

Accordingly, the motion for stay of mandate is denied.

MOTION DENIED.

GLOSSARY

GLOSSARY

Terms	Definitions
App.	The appendix bound with the Director's Petition For Writ Of Certiorari.
benefit year	The one-year period beginning with the Sunday of the week in which a UI claimant first files a valid claim for benefits. 820 ILCS 405/242.
base period	The period prior to the date on which a UI claimant files a claim during which the claimant must have sufficient earnings to qualify.
class members	All claimants for UI benefits under the IUIA who since July 15, 1983, have been, are being or will be denied such benefits by IDES solely because part or all of their wages, otherwise sufficient to satisfy Section 500(E) of the IUIA, were disregarded by operation of section 237 of the IUIA.
determination	A decision issued by IDES pursuant to section 702 of the IUIA, 820 ILCS 405/702, concerning whether a UI claimant should be denied benefits for any reason other than whether he has sufficient earnings in his base period to qualify for benefits.
Director	The Director of the Illinois Department of Employment Security
disregarded wages	The wages that a UI claimant earned in either his lag or filing quarter that cannot be used to establish eligibility when the claimant applies for benefits.
earnings requirement	The eligibility requirement for receipt of UI benefits in Illlinois under which, a claimant must have earned at least $1600 during the whole "base period" and at least $440 outside the calendar quarter in which he earned the most wages. See 820 ILCS 405/500.E.
filing quarter	The quarter in which a UI claimant first files a claim which is also the sixth quarter after the beginning of the section 237 base period.

filing quarter eligible	The class members who need both their claimants lag and filing quarter wages to become eligible.
filing quarter wages	The wages a UI claimant earned in the quarter in which she files for benefits. Filing quarter wages are disregarded because of section 237.
finding	A decision issued by IDES pursuant to Section 701 of the IUIA, 820 ILCS 405/701, concerning whether a UI claimant has sufficient earnings in his base period to qualify for benefits.
IDES	Illinois Department of Employment Security
IUIA	Illinois Unemployment Insurance Act, 820 ILCS 405/100 et seq.
lag period	The gap in a wage record state between a claimant's base period and his benefit year
lag quarter	The completed calendar quarter just prior to a UI claimant's filing quarter which is also the fifth calendar quarter after the beginning of the section 237 base period.
lag quarter eligible	The class members who need only their claimants lag quarter wages to become eligible.
lag quarter wages	The wages a UI claimant earned in the completed calendar quarter prior to the quarter in which she files for benefits. Lag quarter wages are disregarded because of section 237.
movable base period	A base period system used in which an SESA first looks at wages earned in the section 237 base period, but for claimants who lack sufficient qualifying wages in that period, the SESA then redetermines the claim using wages earned in the lag quarter and, in Vermont, in the weeks of the filing quarter prior to the claim.
Pet.	The Director's Petition For Writ Of Certiorari
P. Ex.	Plaintiffs' trial exhibits

qualifying wages	The wages that a UI claimant earned during the section 237 base period that can, therefore, be used to establish eligibility when the claimant applies for benefits.
Resp. App.	Respondent's Appendix which is attached to this Brief In Opposition To Petition For Writ Of Certiorari
Secretary	The United States Secretary of Labor
section 237	Section 237 of the IUIA, 820 ILCS 405/237, which defines the base period used in Illinois.
section 237 base	The first four of the last five period completed calendar quarters immediately preceding a claimant's benefit year.
SESA	State employment security agencies which are the agencies in each state that administer the UI program. IDES is the SESA in Illinois.
Stip.	The Stipulations Of Fact in Section III of the Amended Final Pretrial Order which is at App. 66-83.
Tr.	The trial transcript
UI	Unemployment Insurance
valid claim	A claim for UI filed by a claimant who had sufficient earnings in his base period to qualify for benefits. See 820 ILCS 405/242 and 500.E.
wage record system	A system for acquiring wage data to determine eligibility for UI in which employers that are covered by the state's unemployment insurance statute report gross wages of all their employees to the SESA on a quarterly basis, and in which a "gap" called a "lag period" between the base period and the benefit year is necessary to permit the employers to report and the SESA to post claimants' wages.
wage request system	A system for acquiring wage data to determine eligibility for UI in which the SESA does not request wage information of claimants' employers until claimants apply for benefits, when the wages are required to adjudicate claims.

"when due" clause	Section 303(a)(1) of Title III of the Social Security Act, 42 U.S.C. § 503(a)(1) which requires that state unemployment insurance laws provide for "such methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due."

NO. 94-592

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LYNN Q. DOHERTY, Director of the Illinois Department of Employment Security and successor in office to LOLETA DIDRICKSON and SALLY WARD, former Directors of the Illinois Department of Employment Security,

Petitioner,

-vs-

LUELLA PENNINGTON, individually and on behalf of others similarly situated,

Respondent.

PROOF OF SERVICE

JEFFREY B. GILBERT, one of the attorneys for Respondent herein, hereby certifies that on October 27, 1994, copies of the attached **MOTION TO FILE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS, AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS**, and **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** were served upon:

DEBORAH L. ASHSTRAND
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Service was by hand-delivery (via messenger).

JEFFREY B. GILBERT